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Washington, DC 20463

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FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6642

DATE COMPLAINT FILED: Sept. 18, 2012

DATE OF NOTIFICATION: Not Applicable

DATE OF LAST RESPONSE: Not Applicable

DATE ACTIVATED: November 2, 2012

EXPIRATION OF STATUTE OF LIMITATIONS:  
Aug. 21, 2017

COMPLAINANT:

Ken Martin, Chair  
Minnesota Democratic Farmer Labor Party

RESPONDENTS:

Unknown

RELEVANT STATUTES  
AND REGULATIONS:

2 U.S.C. § 431(4)(A)  
2 U.S.C. § 432  
2 U.S.C. § 433  
2 U.S.C. § 434(b)(4)(H)(iii)  
2 U.S.C. § 434(c)  
2 U.S.C. § 434(g)  
2 U.S.C. § 441d(a)  
11 C.F.R. § 100.5(a)  
11 C.F.R. § 100.26  
11 C.F.R. § 110.11(a)(2)  
11 C.F.R. § 110.11(b)(3)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: N/A

I. INTRODUCTION

The Complaint in this matter alleges that unknown respondents violated the Federal Election Campaign Act, as amended, (the "Act") by paying for a communication expressly advocating the defeat of Senator Amy Klobuchar without a proper disclaimer. The Complaint also alleges that the party responsible for the communication may have been required to file

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1 independent expenditure reports or to register as a political committee, depending on the amount  
2 of money spent on the communication.<sup>1</sup>

3 Based on the available information, this Office recommends that the Commission find  
4 reason to believe that unknown respondents violated the Act by failing to include a disclaimer  
5 and failing to report an independent expenditure. *See* 2 U.S.C. §§ 434(b)(4)(H)(iii), (c)(1), (g),  
6 441d(a). We also recommend that the Commission authorize compulsory process in order to  
7 determine who paid for the ad on the billboard at issue. We finally recommend that the  
8 Commission take no action at this time with respect to the allegations that unknown respondents  
9 violated the Act by failing to register and report as a political committee. *See* 2 U.S.C. §§ 432,  
10 433, 434.

## 11 II. FACTUAL BACKGROUND

12 The Complaint in this matter concerns a large billboard on Interstate 94, west of  
13 Albertville, Minnesota, which contained the slogan "FIRE KLOBUCHAR" with a disclaimer  
14 stating "NOT PAID FOR BY ANY CANDIDATE RUNNING FOR OFFICE." Compl., Ex. A.  
15 The Complaint contends that "KLOBUCHAR" refers to Senator Amy Klobuchar, who was a  
16 candidate for re-election to the United States Senate from Minnesota in 2012. According to the  
17 Complaint, the billboard expressly advocates the defeat of Klobuchar because there is only one  
18 way that a recipient of the message could "fire" Klobuchar — to vote against her in the general  
19 election. Compl. at 1-2.

20 The Complaint claims that because the billboard features the logo of Franklin Outdoor  
21 Advertising ("Franklin"), Franklin likely leased the billboard to the unknown respondents.

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<sup>1</sup> Given the lack of information as to who may have been responsible for the billboard at issue, this Office has been unable to notify a possible respondent.

1 Compl. at 1. According to Franklin's website, the company, located in Clearwater, Minnesota,  
2 sells advertising space on billboards throughout Minnesota and Western Wisconsin. *See*  
3 www.franklinoutdoor.com. Franklin's website provides no information regarding the pricing of  
4 its billboard advertisements.

### 5 III. LEGAL ANALYSIS

#### 6 A. Failure to Include Proper Disclaimer

7 The Act requires that any person who makes a disbursement for the purpose of financing  
8 communications expressly advocating the election or defeat of a clearly identified candidate  
9 must include a disclaimer on any such communication. 2 U.S.C. § 441d(a); *see also* 11 C.F.R.  
10 § 110.11(a)(2). If the communication is not authorized by a candidate or an authorized  
11 committee, the disclaimer must clearly state the name and permanent street address, telephone  
12 number, or World Wide Web address of the person who paid for the communication and state  
13 that the communication was not authorized by any candidate or candidate's committee. 2 U.S.C.  
14 § 441d(a)(3); 11 C.F.R. § 110.11(b)(3).

15 Commission regulations likewise provide that "[a]ll public communications, as defined in  
16 11 C.F.R. § 100.26 . . . that expressly advocate the election or defeat of a clearly identified  
17 candidate" require disclaimers. 11 C.F.R. § 110.11(a)(2). Section 100.26 defines a public  
18 communication to include "outdoor advertising facility" and "any other form of general public  
19 political advertising." *Id.* § 100.26. A communication contains express advocacy when, among  
20 other things, it uses phrases such as "vote against Old Hickory," "reject the incumbent," or uses  
21 campaign slogans or individual words that in context can have no other reasonable meaning than  
22 to urge the defeat of a clearly identified federal candidate. *Id.* § 100.22(a).

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1 The disclaimer requirements of 2 U.S.C. § 441d(a) apply to the billboard here. The  
2 billboard qualifies as a public communication because it is an outdoor advertising facility, as  
3 well as a form of general public political advertising. The billboard contains express advocacy.  
4 The phrase "FIRE KLOBUCHAR!" refers to Senator Klobuchar, who was a candidate for re-  
5 election to the Senate.<sup>2</sup> To "fire" Senator Klobuchar is a call to vote against her and defeat her  
6 candidacy.<sup>3</sup> Therefore, provided that no candidate authorized or paid for the billboard, the  
7 person who paid for and disseminated the advertisement — whether an individual or potential  
8 committee — should have included a disclaimer identifying who paid for the ad, and the  
9 person's address, telephone number, or World Wide Web address.

10 MURs 6486 and 6491 (Hicks) are instructive here. In the Hicks MURs, the Commission  
11 authorized an investigation into a matter involving allegations that unknown respondents failed  
12 to include disclaimers and file independent expenditure reports in connection with two billboards  
13 expressly advocating the defeat of President Obama.<sup>4</sup> See also MUR 6317 (Utah Defenders of  
14 Constitutional Integrity) (authorizing pre-probable cause conciliation and \$1,400 civil penalty in  
15 case involving political committee status, reporting, and disclaimer violations on 2,000 mailers).  
16 Here, as in Hicks, we do not have any information as to the identity of the unknown respondents  
17 responsible for the communication at issue or the costs of the ad. Also, as in Hicks, because the  
18 company (Franklin) that leased the billboard space to the unknown respondents is apparent,  
19 determining the identity of the respondents should not be difficult.

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<sup>2</sup> We found no information indicating that another person with the name "Klobuchar" was running for or holding public office in Minnesota as of August 2012.

<sup>3</sup> The billboard's inadequate disclaimer -- not paid for by "ANY CANDIDATE RUNNING FOR OFFICE" -- suggests the sponsor of the ad sought to make a political statement.

<sup>4</sup> The Commission voted to take no further action when the investigation revealed that the person who paid for the ads had never before sponsored an ad, had no knowledge of campaign finance law, and stated that she had not coordinated her activities with any political party or candidate. See Second Gen. Counsel's Rpt. at 2, MURs 6486 and 6491.

1 The Commission generally has not pursued enforcement in express advocacy disclaimer  
2 cases where the apparent cost of the communications generated a civil penalty below \$1,000 or  
3 where the respondents took prompt corrective action. *See* MUR 6404 (Stutzman) (dismissing  
4 allegation as to billboard and finding no reason to believe as to three road signs estimated to cost  
5 less than \$2,000); MUR 6378 (Conservatives for Congress) (EPS) (dismissing where billboard  
6 owner took partial remedial measures and sending reminder letter); MUR 6118 (Roggio) (EPS)  
7 (dismissing where respondents took timely corrective action and sending caution letter).

8 But here, there was no corrective action and there is reason to believe that the cost of the  
9 billboard advertisement may well have been more than *de minimis*. The billboard is large, is  
10 seated on commercially leased space adjacent to an interstate highway, and may have been  
11 displayed for an extended period of time.

12 Accordingly, we recommend that the Commission find reason to believe that unknown  
13 respondents violated 2 U.S.C. § 441d(a).

14 **B. Failure to Report Independent Expenditure**

15 Under the Act, unauthorized political committees, as well as other persons, must file  
16 reports disclosing their independent expenditures. *See* 2 U.S.C. § 434(b)(4)(H)(iii) (requiring  
17 non-connected political committees to report independent expenditures); *id.* § 434(c)(1)  
18 (requiring every person, other than a political committee to report independent expenditures that  
19 exceed \$250 during a calendar year). Depending on the amount and timing of the expenditures,  
20 a person may have to file a 24- or 48-hour notice of independent expenditures. *See id.*  
21 § 434(g)(1)(A) (requiring 24-hour notices for independent expenditures aggregating \$1,000 or  
22 more after the 20th day, but more than 24 hours, before the date of an election); *id.*  
23

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1 § 434(g)(2)(A) (requiring 48-hour notices for independent expenditures aggregating \$10,000 or  
2 more at any time up to and including the 20th day before the date of an election).

3 Here, the available information suggests that the billboard advertisement may have  
4 constituted an independent expenditure because it expressly advocated the defeat of Senator  
5 Klobuchar and contained a partial disclaimer stating that the advertisement was not paid for by  
6 any candidate. If a political committee made the expenditure, it should have reported the  
7 expenditure in reports filed with the Commission. If a person other than a committee made the  
8 expenditure and the expenditure exceeded \$250, the person should have filed a report with the  
9 Commission. Furthermore, based on the timing and amount spent on the billboard, the unknown  
10 respondents may have been required to file a 24- or 48-hour notice of independent expenditure.  
11 Accordingly, we recommend that the Commission find reason to believe that unknown  
12 respondents violated 2 U.S.C. § 434(b)(4)(H)(iii), (c)(1), and/or (g) by failing to report an  
13 independent expenditure.

14 **C. Political Committee Status**

15  
16 The Act and Commission regulations define a "political committee" as "any committee,  
17 club, association or other group of persons which receives contributions aggregating in excess of  
18 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000  
19 during a calendar year." 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5(a). In *Buckley v. Valeo*, 424  
20 U.S. 1, 79 (1976), the Supreme Court concluded that the term "political committee" "need only  
21 encompass organizations that are under the control of a candidate or the major purpose of which  
22 is the nomination or election of a candidate." Accordingly, under the statute as thus construed,  
23 an organization that is not controlled by a candidate must register as a political committee only if

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(1) it crosses the \$1,000 threshold and (2) it has as its "major purpose" the nomination or election of federal candidates.

The Complaint alleges that unknown respondents may have triggered political committee status by making an expenditure for the billboard, but sets out no facts in support. First, the Complaint does not allege that the ad's sponsor was a group. If the person who paid for the ad was an individual acting alone, he or she would not qualify as a political committee because the Act provides that a political committee is a "committee, club, association or other group of persons." 2 U.S.C. § 431(4)(A). Second, the Complaint has alleged no facts as to whether unknown respondents satisfied the requirements of section 431(4)(A), or as to whether their major purpose of the ad's sponsor was the nomination or election of a federal candidate.

Based on this sparse factual record, we recommend that the Commission take no action at this time with respect to the Complaint's allegation concerning the political committee status of the ad's sponsor. If, during the course of the investigation into the disclaimer and independent expenditure allegations, we discover information relevant to political committee status, we will make the appropriate recommendation at that time.

#### IV. INVESTIGATION

We seek authorization to conduct a limited investigation to identify the unknown respondents who paid to lease the billboard and identify its cost. We also request that the Commission authorize the use of compulsory process, including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary.

V. RECOMMENDATIONS

1. Find reason to believe that Unknown Respondents violated 2 U.S.C. § 441d(a);
2. Find reason to believe that Unknown Respondents violated 2 U.S.C. § 434(b)(4)(H)(iii), (c)(1), and/or (g);
3. Take no action at this time with respect to the allegation that Unknown Respondents violated 2 U.S.C. §§ 432, 433, and 434;
4. Approve the attached Factual and Legal Analysis;<sup>5</sup>
5. Authorize compulsory process; and
6. Approve the appropriate letters.

1/29/13  
Date

Anthony Herman  
General Counsel

Daniel A. Petalas  
Associate General Counsel  
For Enforcement

Mark Shonkwiler  
Assistant General Counsel

Jin Lee  
Attorney

<sup>5</sup> The Factual and Legal Analysis will be sent to the party responsible for the billboard advertisement once its identity is ascertained by the investigation.